THE

CASE

OF

Sir Robert Atkyns,

Knight of the Honourable Order of the *BATH*;

UPON HIS

APPEAL

AGAINST

A DECREE obtain'd by Mrs. *Elizabeth Took* (the now Wife of *Thomas Took*, Esq;) and others, Plaintiffs in *Chancery*, about a Separate Maintenance of 200 *l. per Ann.* clear above all Charges settled on Mrs. *Took*, besides a Large Jointure.

LONDON:
Printed in the Year MDCXCV.

Mrs. Elizabeth Took, *the Wife of* Thomas Took (*now living*) *is Plaintiff in* Chancery.

Sir Robert Atkyns (*the late Chief Baron*) *Defendant.*

Mrs. Took *hath obtained a Decree*, and *Sir* Robert *Appeals to the Lords.*

The CASE upon the Appeal.

THE Plaintiff Mrs. *Took* by her Bill in *Chancery*, sets forth a Title to *John Bennet*, Esq; (as her Trustee) to a Lease for Lives in Nineteen Houses in *Castle-Yard* in *Holbourn*, in Trust to pay her 200 *l. per Ann.* clear above all Charges and Payments, for her Life, as a Separate Maintenance while her Husband Lives. This was by a Deed made by her Husband, Mr. *Took*, in *April* 1686. Mrs. Took's Title.

And by the same Deed she claims further 300 *l. per Ann.* clear in like manner for her Jointure, if she outlive her Husband.

Sir *Robert* (the Defendant) Lent 820 *l.* to the Husband, Mr. *Took*, to help him out of Prison, and to pay his Debts; and took a Mortgage of him of the same Houses, Three years after Mrs. *Took*'s Deed, *viz.* in *May* 1689. So that Mrs. *Took*'s Separate Maintenance is first in time (if it be not fraudulent). Sir *Robert*'s Title.

The *Chancery* upon hearing of the Cause *Trinity Term*, 1694. hath Decreed the Separate Maintenance to be good in Law against Sir *Robert*'s Mortgage; and hath granted a perpetual Injunction to stay the Trial at the Common Law, upon an issue, whether Mr. *Bennet*'s Estate be Fraudulent or not. Which Issue was join'd before Mrs. *Took*'s Bill was Exhibited: But the *Chancery* will not suffer it to be Tried at Law, though it be matter of Fact. Decree for a Separate Maintenance. Perpetual Injunction.

The ground and pretence for Equity against Sir *Robert*, is, That Sir *Robert* had Notice of this Trust of a Separate Maintenance before he took his Mortgage. The Equity. Sir *Robert*'s Notice.

Answ. Sir *Robert* claims not under the Estate in Trust, nor by, nor under Mr. *Bennet* the Trustee; and therefore no Bill nor Equity lies for it against him: And therefore his Notice of the Trust (which he admits he had) is not Material.

That which, probably, misleads the *Chancery*, (as Sir *Robert* supposes,) is the common Case in our Law-Books of an Use, (which was the same thing as a Trust now is).

Viz. If a Feoffee to an Use (before the *Stat.* of 27. of *H.* 8. for transferring the Possession to the Use) had Enfeoffe'd *I. S.* of the

Land, although for a Valuable Conſideration; yet if *I. S.* had Notice of the Uſe, he ſhall be Subject to the Uſe, although he were a Purchaſer, and a *Subpœna* lies againſt him by *Ceſtuy que Uſe*, (the Party for whom the Uſe was); the true reaſon is, becauſe *I. S.* in this Caſe claims in privity of the Eſtate, and derives under the firſt Feoffee himſelf, and comes into the Eſtate in the (*per*) as the Law diſtinguiſhes, and terms it, and not in the (*poſt*) as Sir *Robert* does.

The Defendant in *Chancery*, and Appellant before the Lords, comes in not in the (*per*) but (*poſt*).

And ſo are the Books, *viz.* 7. *H.* 7. *Fitzh. Abr. tit. Sub-pœna, plac.* 18. and 5 *E.* 4. *ib. placit.* 2. & 5. and Dame *Burgh*'s Caſe *Moor*'s *Rep.* 602.

And in this Caſe if *I. S.* were not a Purchaſer, and paid no valuable Conſideration, it is all one whether he had Notice or not; and if he paid a Conſideration, yet if he had Notice before-hand, he ſhall be ſubject to the Uſe, and liable to a *Subpœna* in *Chancery* at the Suit of *Ceſtuy que Uſe*.

But *Note*, The true reaſon and diſtinction in this Caſe is, *I. S.* comes in under the firſt Feoffee himſelf, and under that Feoffee's Eſtate; ſo that there is a privity of Eſtate between them, which is termed (coming in the *Per*).

It has been Reſolv'd by a Chancellor and all the Judges, That the Heir of ſuch a ſecond Feoffee is not liable to a *Subpœna* by *Ceſtuy que Uſe* (but they muſt ſeek to the Parliament) though he be (in the * *Per*) and under a Privity of Eſtate. 8 *E.* 4. *Fitz. Subp. plac.* 8. and 22. *E.* 4. 6. *Bro. Abr. tit. Conſcience, plac.* 23.

*22. *E.* 4. 6. by the Ch. Juſt. *Huſſey. Bro. Conſcience. plac.* 23.

But all the Books are, That no *Subpœna* in *Chancery* lies againſt a Stranger, that is, who is not privy, nor comes not under the very Eſtate, out of which the Uſe iſſues, or the Truſt ariſes, (which is all one) for a † Stranger is he that comes not in the (*per*) but in the (*poſt*) and this is very Caſe of the Appellant Sir *Robert Atkyns*; he Claims not from, nor under *Mr. Bennet*; and in ſuch Caſe Notice is not material.

† Ld. *Cook* 4. Inſt. 85. in the middle of the Fol.

Where a Man is a meer Wrong-doer, as a Treſpaſſer, or Diſſeiſor, and who hath Notice too before-hand of an Uſe or Truſt, even in ſuch Caſe the *Ceſtuy que Uſe*, or *Ceſtuy que Truſt*, (as Mrs. *Took* in this Caſe is,) cannot maintain a *Subpœna*, nor hath any Remedy in *Chancery* againſt ſuch Treſpaſſer, or Diſſeiſor; but muſt take his Remedy by *Sub-pœna* againſt her own Feoffee, or Truſtee, (if there be Cauſe,) to Compel him to enter again upon ſuch a Diſſeiſor, or to bring an Action againſt ſuch a Treſpaſſer. So is 11 *E.* 4. 8. *Bro. Conſcience* 17. at the end of that *placitum*, and *ib. placit.* 27.

Mich. 42. and 43. *Eliz.* in the *Chancery*.

Sir *Moile Finche*'s Caſe in *Chancery* referr'd by Queen *Elizabeth* to all the Judges of *England*, after hearing Councel on both Parts on ſeveral days, and after Conference between the Judges themſelves; it was Reſolv'd, That a Diſſeiſor is ſubject to no Truſt, nor was a *Subpœna* maintainable againſt him: Not only becauſe a Diſſeiſor

Sir. *Edw. Cook.* 4. Inſt. 85. Chap. of *Chancery*. And ſo is the L^d. *Cook.* 1. Rep. 139. b.

was

was in the (*poſt*) but becauſe the right of Freehold and Inheritance was determinable at the Common Law, and not in † *Chancery*; neither had *Ceſtuy que Uſe* (while he was in being) any Remedy in ſuch Caſe.

† 22 E. 4. 6. *ut ſupra.* by *Huſſey*, Ch. Juſt.

If no *Subpœna* will lie againſt a Diſſeiſor, (*i.e.* a wrong-doer,) much leſs againſt a Purchaſer, who comes in by a Legal Conveyance, without any Privity of Eſtate, as Sir *Robert Atkyns* doth.

But, which is yet much ſtronger than all thoſe Caſes before-cited, there is not only a want of Privity in this preſent Caſe of Sir *Robert's*, (which is a ſufficient reaſon why no *Subpœna*, nor remedy in Equity lies againſt him by Mrs. *Took*, the *Ceſtuy que Truſt*): But he pleaded to her Bill in *Chancery*, and inſiſted upon it at the hearing, That he is a Purchaſer upon a Valuable Conſideration, and that the Eſtate for Life made by the Husband, *Thomas Took*, to Mr. *Bennet* in Truſt for a Separate Maintenance for the Wife, is Fraudulent, and therefore void by the Stat. 27 *Eliz. cap.* 4. and that this ought to be tried by a Jury, and determined at the Common Law.

A Fraudulent Conveyance.

And that by their Diſtreining the Tenant for his Rent, who ſued a Replevin, they themſelves had put the matter into a right courſe at Common Law, where a matter of Fact, (Fraudulent, or not Fraudulent,) ought to be tried by a Jury, and not by Witneſſes in *Chancery*, and a Fraudulent Conveyance being made void by the Statute before-mentioned: the Expoſition of Statutes belongs to the Judges of the Common Law, and not to a Court of Equity; and eſpecially there being Eſtates of Freehold and Inheritance on both ſides concern'd in this Caſe, which is examinable and determinable by the Courts of the Common Law, and the Rules of Law, and not in Equity by Witneſſes: And they themſelves had join'd Iſſue upon the Fraud, and a Jury return'd to try it before they Exhibited their Bill in *Chancery*. And Notice of the Truſt before he took the Mortgage, being alſo confeſs'd by Sir *Robert* in his Anſwer, (if it be at all material,) it is ſo upon the trial of the Iſſue, to prove their Deed not Fraudulent; ſo that ſhe might take the benefit and advantage of that upon the Trial at Law, if it be material.

Triable by a Jury, not by Witneſſes in *Chancery*.

A Statute is to be expounded by the Judges, not in *Chancery*.

The *Chancery* may not determine Freehold.

Note, Sir *Robert* hath no way to overthrow their Deed and Title but by making it out to be Fraudulent: If it be not Fraudulent, they are ſafe, for their Deed is *prior* in time to Sir *Robert's* Deed by Three years; ſo that they had no need, if it were not Fraudulent, to reſort to Equity: If it be a Fraudulent Deed, Will a Court of Equity ſupport it? Which ſhould rather relieve a Purchaſer againſt frauds; eſpecially in the Caſe of ſuch an upſtart, and miſchievous, and late invention, as a Separate Maintenance is, granted by the Husband, *Thomas Took*, about Ten Years after Marriage, (there being no preceding Agreement before Marriage for it;) and being in Conſideration only of her joyning with her Husband in a Fine for the Sale of

ſome other Houſes, wherein ſhe was alſo Entituled by the Marriage to her Thirds, and this being done in the year 1686. Whereas,.

1ſt. She had before (in the year 1684) levied a Fine with her Husband to enable him to Mortgage, and Borrow Money to pay his Debts, and then 100 *l. per An.* Separate Maintenance was ſettled on her, which was large enough, conſidering his mean Eſtate; and ſhe parted with no Thirds in 1686; (ſo the Conſideration was but feigned in 1686. when the 200 *l. per Ann.* was Settled).

2dly. The Husband in 1686. was much more Indebted than in 1684. and yet the Separate Maintenance muſt then be doubled, *viz.* from 100 *l.* to 200 *l. per An.* clear, and many of thoſe Debts remain unpaid to this day, as is prov'd in this Caſe.

3dly. The only conſideration for the Separate Maintenance of 200 *l. per Ann.* clear in the Deed of 1686. being her then joyning in a Fine, and barring of her Thirds; (all which was done before in 1684.); but by this Deed of 1686. She has 300 *l. per Ann.* beſides, clear above all Payments ſettled upon her for her Jointure, in Lieu of her Thirds (if ſhe ſurvive;) which is far greater in proportion too, than the whole Eſtate would have born, had ſhe been left to her Thirds. And this is a more ſuitable Recompence too for her Thirds, being in caſe ſhe ſurvive, (as the Thirds would have been,) but ſhe muſt hook in a Separate Maintenance too in the mean time, while the Husband is alive.

300 *l. per Ann.* Jointure beſides.

And there is nothing elſe left to maintain him, nor to pay his Debts, but he was forced to take up Money of Sir *Robert* to pay off ſome of his Debts, and to fit him for an Employment in the Army; for which Money ſo borrowed, Mr. *Took* Mortgag'd theſe Houſes to Sir *Robert* Six years ago; and not a Penny, Principal or Intereſt paid in Six years time, nor like to be (if this Decree ſtand) while Mrs. *Took* lives, who is about 34 years old.

4thly. A Separate Maintenance is the ſame thing with *Alimony*. Now in the *Exchequer Chamber*, 15 *Car.* 2. in the Caſe of *Manby* againſt *Scot*, the then Chief Juſtice *Bridgman*, and the reſt of the Judges there, were of Opinion, That by Law the Wife ſhall be maintain'd according to the preſent Eſtate, and not only according to the Degree of the Husband. See *Siderfin's Reports*, Fol. 128. But this Separate Maintenance, and *Alimony* of 200 *l. per Ann.* clear of all Payments, ſwallows up all the Husband's Eſtate; none is left.

The nature of a Separate Maintenance.

There are many other Badges of Fraud, which Sir *Robert* reſerved to be made out upon the Trial before the Jury, but held them not proper at the Hearing; ſo that the Opinion of that Court for Allowing and Confirming the Separate Maintenance, was a ſurprize upon Sir *Robert*.

Sir *Robert* at the Hearing mov'd the Lord Keeper that he would hear the Opinion of ſome of the Judges, in the Caſe concerning the

Juriſdiction

Juriſdiction of Courts of Law and a Court of Equity) but it would not be granted.

Yet it appears by the Caſes before-cited, (and many more in the Books,) That in Caſes of Uſes, the Chancellor was heretofore uſed to Adjourn ſuch Caſes into the Exchequer-Chamber, and to go thither himſelf, and to have the Caſes there debated by all the Judges; which kept a good Correſpondence among the Courts, and kept Equity within ſome bounds. See the before-cited Caſe of 8 *E.* 4. *Fitz. Abr. Tit. Subpœna Plac.* 8. and much of that Title, to the ſame purpoſe.

It may be Obſerv'd out of all that hath been ſaid, That the preſent Decree incroaches upon the Common-Law, in ſeveral main points.

1*ſt*. In Examining and Determining a Matter of Fact (whether a Conveyance be Fraudulent or not Fraudulent) by Witneſſes, which ought to be Tried by a Jury of Twelve Men. And this is done by the Chancery too, after an Iſſue join'd at Law, upon that very point, before any Bill Exhibited: And Sir *Robert* at laſt muſt pay the whole Charge of both, near 200 *l.* Coſts, beſides his own Charges, and mighty trouble.

2*dly*. The Chancery by this Decree hath taken upon it to determine a Matter of Freehold, (which is in Queſtion on both Sides, and claimed by both Parties,) which is not Determinable in a Court of Equity, but only at the Common-Law, and by Judges Sworn to judge according to Law, and not after the Rules of Equity.

3*dly*. By drawing in a Purchaſer to anſwer to, and to be Subject to a Truſt, to which he is neither Party nor Privy: Neither claiming under the Truſtee, (Mr. *Bennet*,) nor under Mrs. *Took*, for whom the Truſt is, contrary to all the Authorities in the Books both Ancient, and Modern, in this very point, and againſt the Rules and Precedents in Chancery: A Truſt now being the ſame thing with an Uſe, as it ſtood before the Statute of 27 *H.* 8. for Transferring the Poſſeſſion to the Uſe. As fully appears by that Statute, wherein Uſe and Truſt are often repeated as ſignifying the ſame.

A Truſt is the ſame thing as an Uſe was.

4*thly*. By entertaining a Suit, and Decreeing in Equity, when there is a plain Remedy at Law, (in the Name of the Truſtee, Mr. *Bennet*.) For if Mr. *Bennet*'s Eſtate be good in Law, (which ought to be determin'd at Law,) then the ſeparate Maintenance muſt be good, and cannot, nor will not be conteſted: And Mr. *Bennet*'s Deed and Title at Law is Prior in time to the Appellant Sir *Robert*'s Mortgage: So that if it be not Fraudulent, it is not in the leaſt danger.

Mrs. *Took* hath Remedy at Law in the Truſtee's Name.

1. It is ſuppoſed, that this is the firſt Precedent wherein a Court of Equity hath countenanc'd that new thing, (a ſeparate Maintenance, or Alimony,) and that againſt a Purchaſer.

2. And

2. And ſo large a ſeparate Maintenance as 100. *per An.* clear above all Payments, out of ſo ſmall an Eſtate as her Husbands is.

3. And which was Granted by the Husband Ten years after their Marriage, and not in performance of any Marriage-Agreement.

4. And the Husband being, at the time of Granting of it, greatly Indebted, many of which Debts are unpaid to this Day: So that the Husband is driven from his Wife and Home by reaſon of his Debts; and the Husband hath nothing left him to live upon, but what his Wife ſecretly ſpares him, (as he has receiv'd ſeveral Sums ſince the Granting this ſeparate Maintenance, as appears in proof,) which proves the Fraud.

5. The Husband having borrow'd the Appellant's Money to enable him to pay his Debts, and to ſet him at Liberty, and to procure and fit him for an Employment in the Army.

A former ſeparate Maintenance.

6. And where the Wife had a former ſeparate Maintenance of 100*l.* *per An.* Granted her about two Years before, upon her joining in a Fine, and barr'd her ſelf of her Thirds, (if ſhe Surviv'd), in Recompence of which Thirds too, ſhe hath by this very laſt Settlement 300 *l. per An.* clear above all Payments for her Jointure, (if ſhe Survive.)

A Jointure of 300 *l. per Annum.*

And in this Caſe, the Purchaſer (the Apellant Sir *Robert Atkyns*) hath not had one penny Principal or Intereſt, after Six years parting with his Money; which Money he is ſtill willing to have repaid him, and to quit the benefit of the Purchaſe.

Note,

Sir *Robert Atkyns* lets Mrs. *Took* enjoy 18 of the 19 houſes.

The Appellant, Sir *Robert*, hath had ſo great tenderneſs and reſpect to the Reſpondent Mrs. *Took*, (that claims this preſent Maintenance) as to gain to himſelf the Poſſeſſion but of one Houſe of nineteen Houſes, which he hath gained too, not againſt her, nor her Truſtee, but by his own Suit, and at his own charge, againſt one *Collins*, who detain'd it from the Eſtate of Captain *Took* ſeveral years, and conceal'd it from them: So that it was given by them for loſt, and not ſo much as look'd after by them, (tho it had ſome time paid them Rent;) they contenting themſelves all the while with the other Eighteen Houſes, and may (if they will be quiet) enjoy their eighteen Houſes for the future. Which eighteen Houſes (if well look'd after, and if the Rents of them were duly Collected) will be very ſufficient to anſwer Mrs. *Took* her full ſeparate Maintenance of 200. *per An.* during her Life, if Sir *Robert* might have the naming of the Collector, which is deny'd him by the Decree.

There are Two things more yet remaining in this preſent Caſe to be remembred.--1. The now Appellant Sir *Robert Atkyns* (then Defendant) moved the Lord Keeper at the Hearing, That he might have Reparation againſt the Plaintiffs in that Bill, eſpecially againſt the Plaintiff *Bedford*, a Clerk in Chancery, who needleſly thruſt himſelf in to be a Plaintiff, and drew the Bill himſelf, as appears by the Bill Fol 34, 35, 36.) and alſo againſt the Plaintiff's Council, who ſign'd the Bill, *viz.* Sir *William Williams*, *Sergeant Bretland*, and *E. Otterborn*,

for

for the Scandals caſt upon the Appellant Sir *Robert*, (who at that time was Chief Baron of the *Exchequer*, and an Aſſiſtant to the Houſe of Lords.) Scandal.

1. The Bill charges the then Defendant, (Sir *Robert*,) as acting againſt the Plaintiff, (Mrs. *Took*,) by his Greatneſs and Power. *Fol.* 44. and 46. (which Reflects upon him in Relation to his Judge's Office.)

2. And *Fol.* 54. and 55. That Sir *Robert* threatens to ruin the Plaintiff, (Mrs. *Took*,) in Law-Suits, unleſs ſhe will comply with his unreaſonable deſires.

3. And *Fol.* 58. and 60. That Sir *Robert* carried on the Suit at Common-Law, in the Replevin, in the Name of *Hook*, contrary to *Hook*'s deſire.

All which are very falſe, and the Plaintiffs have not made the leaſt proof of them; but the contrary of them appears by *Hook*'s owning the Suit by Replevin. Nor were they at all material to the Bill, which had been as ſufficient without them.

By the Stat. of 8 *Eliz. Cap.* 2. *Parag.* 4. The penalty for Suing in another's Name without the conſent of ſuch Perſon, is ſix Months Impriſonment without Bail, and not then to be delivered out of Priſon, till firſt paying treble Damages, and Coſts, and Ten pounds penalty beſides; yet the Court would have no regard to all this, but it muſt remain to Poſterity upon the File.

It is uſual in *Chancery*, (as it was alſo in the Star-Chamber,) and other Courts, to give Damages to the Defendant for the Scandals in the Bills, and there are Precedents of it.---But the Lord-Keeper held theſe no Scandals.

Sir *Robert* Appeals to the Lords herein, and prays he may have Reparation, as well againſt the Council that Sign'd the Bill, as againſt the Plaintiffs; and that the Bill may be taken off the File.

It may perhaps be offer'd by the Reſpondents, (Mrs. *Took*, &c.) upon the Hearing this Appeal before the Lords, That in the hearing of the Cauſe in *Chancery*, a Bill Exhibited by the Appellant, (Sir *Robert*,) in the *Exchequer*, againſt Mrs. *Took*, and her Husband, (Capt. *Took*,) and againſt her Truſtee, (Mr. *Bennet*,) and againſt *Hook*, (the Tenant of the *Roſe-Tavern*, &c.) was read; whereby it appear'd that Sir *Robert* in Effect then admitted of Mrs. *Took*'s Separate Maintenance, and Mr. *Bennet*'s Eſtate, (in Truſt for her,) as good, and claimed to himſelf only the overplus of the Rents, (if any) during her Life, and the Reverſion of the whole after her Death.

In this Bill of Mrs. *Took*'s in the *Chancery*, whereupon the Decree now Appeal'd from, is made, there is not any Allegation, nor the leaſt touch or mention of that Bill of Sir *Robert's* in the *Exchequer*, nor of the Matter of that Bill: For had it been alledg'd in Mrs. *Took*'s *Chancery*-Bill, Sir *Robert* could have given it a full Anſwer, Anſw.

and ſhewn how that Sir *Robert* at the Exhibiting of his Bill in the *Exchequer*, had not ſo fully diſcovered the Fraud of the Separate Maintenance, as he has done ſince, but believ'd; (as the Deed for the Separate Maintenance, does alledge, ſee her Deed,) that the Rents were ſufficient to anſwer her the 200 *l. per An.* and that 160 *l. per An.* over, would have been left for Sir *Robert*, which by her proofs appear to be falſe, and the Rents ſhort of making good her 200 *l. per An.* as ſhe alledges: See her Bill. *A Court muſt proceed Secundum Allegata.*

2*dly.* The reading that Bill of Sir *Robert*'s in the *Exchequer*, and indeed all the proof offer'd at the hearing the Cauſe in *Chancery*, were irregular, there *being* nothing in the Cauſe in the *Chancery* put in Iſſue by the Bill and anſwer. The only Equity of the Plaintiff, Mrs. *Took*'s Bill, being a Truſt of the Separate Maintenance, and Sir *Robert*'s Notice of it; both which were confeſs'd by Sir *Robert* in his anſwer. He only inſiſted upon it both by his Plea and Anſwer, that their Deed was Fraudulent, which ought to be tried at the Common-Law; and that he being a Stranger, (neither Party nor Privy,) therefore the notice was not material. Here was nothing remain'd that requir'd proof in *Chancery*; yet to increaſe the Charge, the Plaintiffs proceeded to proofs, which has given occaſion to Sir *Miles Cook*, to load Sir *Robert* with near 200*l.* Coſts; which, tho excepted too, is confirm'd by the Court.

3*dly.* Had the matter of Sir *Robert*'s Bill in the *Exchequer* been the leaſt hinted at, or ſtirr'd in Mrs. *Took*'s Bill in *Chancery*, Sir *Robert* had been awakened by it, and forewarn'd to have anſwer'd to it, and made proof upon it, *Viz.*

That his Bill in the *Exchequer* was deſigned meerly to ſtate the Debt owing to him by Mr. *Took*, and to compel him to a Redemption of the Mortgage, or to be barr'd of his Redemption; and all Parties, (as was propos'd to Sir *Robert* on the behalf of Mr. *Took*,) were inclin'd to get an Act of Parliament paſs'd for the ſale of Mr. *Took*'s Eſtate; and to have the Debt due to Sir *Robert* upon the Mortgage, and the Debts to his other Creditors paid off, and a proviſion afterwards made for Mrs. *Took*, which Sir *Robert* offer'd to further: So that it was not ſo ſeaſonable nor proper at that time to queſtion their Title, nor to object Fraud againſt it. Nor was it proper for Sir *Robert* to Object or Controvert the Fraud of it in Equity, there being ſufficient Remedy againſt it at the Common-Law; which Courſe too he afterwards purſued, when he found they proceeded not in their Agreement to get the Act of Parliament paſs'd. And the Fraud more plainly appearing,

4*thly.* Sir *Robert* at the hearing of this Cauſe in *Chancery*, oppos'd the reading of his *Exchequer*-Bill in Evidence, as being no regular proof or evidence either in Law or Equity. Bills in Equity being the Invention and Surmiſes of the Council that draw them; and the Suggeſtions and Allegations that are in them, are indeed but of the Nature of Interrogations to enforce a Diſcovery from the Defendants,

A Bill in Equity is no Evidence in another Suit.

dants, but are no Concluſions, nor Eſtopples to the Parties that exhibit them, nor evidence againſt them, who do not ſo much as Sign them themſelves.

Nor ſhall Sir *Robert's* Bill in the *Exchequer* controll his Indenture of Mortgage, whereby the Fee-Simple of the Houſes in Queſtion is conveyed in poſſeſſion to him, and not a Reverſion only.

Nor ſhall it overthrow his Anſwer upon Oath in this Cauſe, wherein he makes Title to the Houſes in Poſſeſſion, as being the Purchaſer of them for a valuable conſideration, and being indeed forced to accept the Mortgage, (by Mr. *Took's* defrauding him of a former ſecurity, which Sir *Robert* had for his Money,) or elſe Sir *Robert* muſt have loſt his money. Note.

Now that Sir *Robert's Exchequer*-Bill ought not by the Rules of Law to have been allow'd for Evidence, no not in the *Chancery*, tho between the ſame Parties, appears by a printed Caſe, by the Reſolution of a Lord-Chancellor too, in the very like Caſe in the main; but the preſent Caſe on Sir *Robert's* part is much ſtronger than that too on his Side.

The Caſe is *Mich.* 14. *E.* 4. *Fitzh. Abr. Tit. Subpœna plac.* 15. One *Tate* was Sued in *Chancery* by a Bill in Equity, (as Sir *Robert* is,) and made to anſwer upon Oath at the Hearing, (juſt as was in this preſent Caſe,) a Bill of *Tate's*, (then Defendant,) exhibited by him in the ſame Court too, and for the ſame matter, (and thereupon ſo much the ſtronger againſt *Tate*,) was offer'd to be read, which did contradict and differ from his anſwer: By the Chancellor, (by advice of the King's Sergeants,) *Tate's* Bill was not to be regarded, for he was Sworn to his Anſwer, but not to his Bill.

5. If Sir *Robert's Exchequer*-Bill had been Evidence, (as it is not,) yet it ſerves only to prove, that (in Sir *Robert's* opinion at that time when his bill was Exhibited,) Mrs. *Took's* Deed of Separate Maintenance was not Fraudulent, or that he then had not diſcovered the Fraud.

This would then have been proper to have been offer'd upon the trial of the Iſſue at Common-Law, but is no Ground for a Decree: And Sir *Robert* may change his Opinion upon further Diſcovery of the Truth of the Caſe; for it is at moſt but his then apprehenſion of it, it alters not the truth of the Caſe, nor the matter of Fact in it: and he was ſeduced into that good opinion of Mrs. *Took's* title to her Separate Maintenance by Mrs. *Took's* own Deed, which did affirm the yearly value to be 360*l. per An.* which (had it been true,) would have been ſufficient for both their turns; but in truth there has not been enough to pay the 200*l. per An.*

Separate Maintenances are but of late Invention, and bring many miſchievous conſequences after them: And not one Precedent of the *Chancery*, (as 'tis believ'd) can be produc'd, where ever, (before this Decree,) a Separate Maintenance hath been Countenanc'd againſt a Purchaſer. Which Purchaſe to the Appellant, (Sir *Robert Atkyns*,) never

Sir *Robert* was forced to take this Mortgage.

never was made out of any greedineſs of profit, but he was meerly driven to it, to accept it as a farther Security, after he had parted with his Money to the Husband, who had defrauded Sir *Robert* of a former Security, (as appears by the proofs,)

And either the Husband or the Wife, or any Friend of theirs on their behalf, may ſtill redeem if they pleaſe, if it be done in ſome reaſonable time, Sir *Robert* will be willing to accept of his money again.

Sir *Robert* hopes to be excus'd for uſing this Freedom with the *Chancery*; It being generally known, that long before this preſent occaſion, even while he himſelf Sate in a Court of Equity, (eſtabliſhed by Act of Parliament,) he both in that Court, and in the Higheſt Court, (the Houſe of Lords,) diſcharg'd his Conſcience, by inveighing againſt the Encroachments of Courts of Equity.

To Conclude, The Apellant, (Sir *Robert Atkyns*,) humbly moves the Lords, to take up the ſame reſolution in this preſent Caſe, (which appears in the Precedent and Example to be of higheſt conſequence,) as their Noble Anceſtors and Predeceſſors did in the Twentieth Year of King *Henry* the *IIId.* when the Statute of *Merton* was made, *Chap. 9th.* The Lords being preſs'd by all the Biſhops to make the Ancient Law of *England* to conform to the Conſtitution of the Church but in one point, *Viz.* That Children born before Matrimony might be accounted Legitimate, and Inheritable to Lands. All the Earls and Barons with one Voice anſwered, *That they would not change the Laws of the Realm, which hitherto have been* Uſed *and* Approved.

Erratum, P. 4. l. 30. add *the*.

FINIS.

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